93-819

No.

Supreme Court, U.S.
FILED
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OFFICE

In The

Supreme Court of the United States

October Term, 1993

BRENDA JANEAU,

Petitioner,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the policy favoring disposition of cases "on the merits" requires reinstatement of an action in which both parties were actively engaged in timely discovery depositions less than seven days prior to judgment of dismissal with prejudice;

2. Whether a trial court's dismissal power should be exercised "*only* on the face of a record of delay or contumacious conduct *by the plaintiff*";

3. Whether the proper exercise of a trial court's dismissal power requires a determination of the plaintiff's own privity to "delay or contumacious conduct';

4. Whether expert testimony is indispensable to establish a *prima facie* case in a defective product action.

LIST OF PARTIES

The following are parties who have a real or potential interest in the outcome of this case:

Pitman Manufacturing Company, Inc.: Francis H. Brown, III, George Frazier, Lemle & Kelleher, 601 Poydras Street, 21st Floor, Pan-American Life Center, New Orleans, Louisiana 70130;

Brenda Janeau: Michel P. Wilty, Robert B. Keaty, Keaty & Keaty, Attorneys at Law, Suite 104, One Lafayette Square, 345 Doucet Road, Lafayette, Louisiana 70503, Attorneys for Petitioner.

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No.

In the

Supreme Court of the United States

October Term, 1993

BRENDA JANEAU,

Petitioner,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

Brenda Janeau hereby petitions the Court to issue a Writ of Certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit entered on July 27, 1993.

OPINIONS BELOW

The Per Curiam Opinion of the Court of Appeals is unpublished pursuant to I.O.P. 36.5 and 36.6. The case number in the Court of Appeals for the Fourth Circuit is 92-1923.

The ruling of the District Court is unreported. The case number in the Western District of North Carolina, Charlotte Division, is 90-194-V.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was entered July 27, 1993. An Application for Rehearing was timely filed and subsequently denied on August 24, 1993. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. § 1254. The District Court had jurisdiction over the case pursuant to 28 U.S.C.A. § 1332. The Court of Appeals had jurisdiction over the matter under 28 U.S.C. §1291.

CONSTITUTIONAL PROVISIONS INVOLVED

The relevance of particular constitutional provisions is not raised in this matter.

STATEMENT OF THE CASE

Following removal to federal court, as well as multiple case transfers, a judge's recusal, and docket reassignments, Petitioner's tort claims for the wrongful death of her son, John Janeau, were summarily dismissed on May 14, 1992.

The "Scheduling Order"[1] entered by the District Court on *March 3, 1992* allowed the parties to amend their pleadings and add new parties until May 15, 1992, *eight days after* the Order of Dismissal.[2] Moreover, the District Court's March 3, 1992

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1. *See* Appendix E, *infra*, page 17a.

2. *See* Appendix D, page 12a.

Scheduling Order would have allowed the parties to conduct further discovery until July 1, 1992, more than forty-five days *after* Petitioner's case was dismissed.

Six days prior to the judgment dismissing Petitioner's claims, counsel for the parties completed seven "fact witness" depositions which began on May 6, 1992. Nonetheless, because the Petitioner had not designated a trial expert within the time allotted by the District Court (April 15, 1992), the Respondent urged its "Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of this Matter".

Absent any assertion that the trial on the merits would be delayed or prolonged unless expert testimony was presented, the trial court dismissed Petitioner's claims with prejudice.

* * *

Petitioner's son, John Janeau, died on December 5, 1988, following an on-the-job electrocution accident in which a defective crane, manufactured by the Respondent, contacted an overhead power line.

On November 2, 1989, Petitioner was appointed Provisional Administratrix of the "Succession of John Ray Janeau" by the 25th Judicial District Court for the Parish of Plaquemines, Louisiana, where she resided. Subsequently, on November 29, 1989, *the underlying action for wrongful death and survival damages was timely filed in the Civil District Court for the Parish of Orleans, State of Louisiana.* Petitioner's original claims were premised upon the Respondent manufacturer's "duty to warn" of unreasonable hazards and dangers arising from design and manufacturing defects in the subject crane.

Respondent filed a "Notice of Removal" on January 4, 1990,

thereby removing the case to the United States District Court for the Eastern District of Louisiana. While the Petitioner's claims were pending in the federal court in Louisiana, Petitioner's counsel conducted the thorough and lengthy deposition of the Respondent, Pitman Manufacturing Company, Inc., pursuant to Rule 30(B)(6) of the Federal Rules of Civil Procedure. Thereafter, on motion by Respondent, this matter was transferred to the United States District Court for the Western District of North Carolina,Charlotte Division, on June 25, 1990. Following the transfer of this action to the Charlotte Division of the United States District Court for the Western District of North Carolina, extensive fact witness depositions were conducted in North Carolina by Petitioner's undersigned counsel and, as well as Respondent's Louisiana counsel.

Subsequently, on November 2, 1990, on the *ex parte* motion of the *Respondent,* the trial on the merits and corresponding pre-trial "cut-offs" were postponed. In support of its "Ex Parte Motion for Extension," Respondent represented as follows:

> (2) A substantial portion of discovery has been completed, including plaintiff's deposition, *the corporate deposition of Pitman,* and *plaintiff's response to an extensive discovery request from Pitman;*
>
> (3) *Despite the diligent effort of counsel for plaintiff* and defendant, the remaining discovery cannot be completed with the deadlines set . . .

Thus, it was indeed the respondent who sought delay and postponement of discovery.

Subsequently, the originally designated trial judge in the

United States District Court for the Western District of North Carolina, Asheville Division, was recused, *sua sponte*. Thereafter, on February 27, 1991, this action was transferred from the Asheville Division to the Charlotte Division of the Western District of North Carolina.

Despite the passage of over eleven months since Petitioner's claims had been transferred to North Carolina, *Respondent delayed until June 3, 1991,* before challenging Petitioner's procedural capacity to sue on behalf of her son's estate under North Carolina Law.[3] Petitioner urged the District Court to recognize "the Estate of John Ray Janeau" (which Petitioner had been duly appointed to represent in Louisiana, where this action was commenced) as a "juridical person" having proper capacity to sue under Louisiana law. While such dispositive motions remained pending and under advisement, it was deemed prudent to postpone discovery which would potentially require the duplication of expensive travel for both Petitioner's and Respondent's counsel from Louisiana to North Carolina. Approximately five months later, the District Court ruled that Petitioner must qualify as the personal representative of her son's estate under North Carolina law in order to proceed with the claims which had been transferred, for the "convenience" of the parties, from the United States District Court for the Eastern District of Louisiana. In accordance with the letter of the District Court's October 25, 1991 ruling, Petitioner obtained timely and proper qualification as the personal representative of her son's estate in compliance with North Carolina law. According to the Fourth Circuit panel below, on December 3, 1991, on Respondent's motion, the District Court "dismissed the instant case for failure to comply with [the Order of October 25, 1991] in a timely fashion."[4] However, the District

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3. *See* Appendix B, page 6a.

4. *See* Appendix B, page 7a.

Court subsequently recinded its order of dismissal because the Order of October 25, 1991 neither required, nor suggested, that the court must receive special notification of Petitioner's timely compliance with North Carolina's qualification requirements. Thus, because the October 25, 1991 Order contained no "Court notification" requirement, *a fortiori*, no "Court notification" time limit could conceivably have been violated by *Petitioner's counsel.*

Thereafter, on December 30, 1991, Petitioner timely amended her complaint as instructed by the District Court. Less than five months later, in the course of ongoing discovery, indicative of the active prosecution of Petitioner's claims, this matter was erroneously dismissed with prejudice.

REASONS FOR GRANTING THE WRIT

I.

THE EXERCISE OF THIS COURT'S SUPERVISION IS WARRANTED TO CORRECT THE ERRONEOUS RULINGS BELOW WHICH CONTRAVENE THE LONGSTANDING JUDICIAL POLICY FAVORING CASE DISPOSITION ON THE MERITS.

The dismissal of Petitioner's claims, with prejudice, offends the fundamental precepts of our United States judicial system. The Fourth Circuit panel below erroneously declined to reverse the District Court's dismissal although: (A) less than five months earlier, the Petitioner's complaint had been timely amended in accordance with the District Court's instructions; (B) Petitioner had been represented by counsel throughout seven "fact witness" depositions conducted during the month prior to the judgment from which this appeal arose; and (C) over forty-five days remained for further discovery under the District Court's "scheduling order."

As heretofore universally recognized among the Circuit Courts of Appeals, "since dismissal is among the harsher sanctions and contravenes the longstanding policy favoring dispositions on the merits, it must be cautiously invoked." *See Velazquez-Rivera v. Sealand Services, Inc.*, 920 F.2d 1072 (1st Cir. 1990). The May 14, 1992 dismissal herein ignores the active prosecution of Petitioner's claims including the considerable expense and effort of seven "fact witness" depositions *during May 1992*, at a juncture when the pleadings could yet be amended, additional parties could be joined, and an additional forty-five days remained for the completion of discovery. Accordingly, the *per curiam*, below, signals such a drastic departure from the accepted and usual course of judicial proceedings as to warrant the exercise of this Honorable Court's supervisory review.

As the record below clearly reflects, Respondent maintained its original counsel whose offices in New Orleans, Louisiana, are over six hundred miles from the transferee District Court. Consequently, as discussed with Respondent's counsel on numerous occasions, during the lengthy period when the joinder and "capacity" of the parties had been taken under advisement by the District Court on dispositive motions, it was deemed prudent *by both parties* to postpone discovery. Once the joinder and procedural capacity issues had been resolved, and the Petitioner's complaint was amended to the satisfaction of the District Court, the continued earnest efforts of Petitioner's counsel in scheduling and conducting discovery is evidenced in the completion of fact witness depositions taken during the month prior to dismissal.

II.

BY AFFIRMING DISMISSAL WITHOUT THE SLIGHTEST INQUIRY AS TO "THE DEGREE OF PERSONAL RESPONSIBILITY OF THE PLAINTIFF" THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS.

Because the record was entirely devoid of "delay or contumacious conduct by the plaintiff" and the District Court failed to inquire or determine whether the Petitioner was privy to any "dilatory conduct," the holding below is directly at odds with the settled authorities among other Circuits.

There is no basis whatsoever for the statement by the Fourth Circuit panel, below, that "Janeau has taken little action to prosecute her claim or to respond to Court orders and defense requests." (*See* App. p. 10a). Indeed, the procedural history of this action does not reflect a single instance of deliberate delay by Respondent's counsel. Consequently, the Fourth Circuit panel's Per Curiam Opinion herein is in blatant conflict with numerous long respected prior decisions among the United States Courts of Appeals, including the Fourth Circuit.

In *Dove v. Codesco,* 569 F.2d 811 (4th Cir. 1978), the Fourth Circuit embraced the reasoning set forth in *Durham v. Florida East Coast Ry. Co.*, 385 F.2d 366 (5th Cir. 1967), and emphasized that:

> Indeed, it has been the view of this and other Courts of Appeals that the dismissal power should be exercised "only on the face of a clear record of delay or contumacious conduct *by the plaintiff.*"

See Dove, 569 F.2d at pg. 810. The *Dove* court based its holding on

this Honorable Court's decision in *Link v. Waubash Railroad Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962) in which the "plaintiff's dilatoriness in prosecuting the case was well documented." *Dove*, at pg. 810. In contrast to the procedural history confronted by this Court, divided 4-3 in *Link*, in which "at the time of the scheduled pre-trial conference, the action had been pending on the District Court's docket for six years," the record in the instant case certainly reflects no deliberate delay by the Petitioner, Mrs. Janeau.

The Per Curiam Opinion by the panel below reflects a vast departure from previous Fourth Circuit authorities which had been in harmony with the various Circuit Courts of Appeals. In *Garland v. Peebles*, the Eighth Circuit recently reiterated its requirement that "a dismissal for failure to prosecute is proper when there has been a 'clear record of delay or contumacious conduct *by the plaintiff.*' " *See Garland v. Peebles*, 1 F.3d 683 (8th Cir. 1993) *citing Brown v. Frey*, 806 F.2d 801 (8th Cir. 1986). In *Garland*, the Eighth Circuit upheld dismissal where the record demonstrated that the Plaintiff, herself had personally "engaged in conduct that prevented this case from going to trial. She created an ethical conflict that forced her attorneys to request to withdraw from her case." *See Garland*, 1 F.3d at pg. 686. Moreover, the Eighth Circuit in *Garland*, emphasized that the District Court had personally conferred directly with the Plaintiff, had "begun the conference by explaining certain ground rules", and had thereby directly determined the basis for delay.

Likewise, the Seventh Circuit recognizes the particular relevance of the Plaintiff's "privity" to, or direct responsibility for, delays warranting dismissal. In *Lucien v. Breweur*, __ F.3d __, 1993 Westlaw 437482 (7th Cir. Oct. 29, 1993), the Seventh Circuit recognized that:

> The misfeasant, moreover, was the party

> himself, not any lawyer, so it is not a case of punishing the client for his lawyer's failures.

Lucien v. Breweur, 1993 Westlaw 437482 (7th Cir. 1993). Moreover, in *Lucien,* the Seventh Circuit, citing *Callip v. Harris County Child Welfare Department,* 757 F.2d 1513, 1518-19 (5th Cir. 1985) observed that "the criteria for sanctions under Rules 16(f), 37(b) and 41(b) are the same."

Consequently, irrespective of which Federal Rule of Civil Procedure is cited, the Plaintiff and his or her counsel provide the only two alternative sources for a "failure to prosecute". Petitioner respectfully submits that there is an important significance in the Appellate Courts' choice of terms, and that the importance of such "phraseology" rises to the level of substance, rather than mere semantics. Were it unnecessary for a Court which perceived a "failure to prosecute" to inquire and determine whether the Plaintiff, as distinguished from his counsel, was directly responsible for, (or at least privy to) such failure, the well settled authorities would hold that:

> Dismissal for failure to prosecute is proper when there has been a clear record of delay or contumacious conduct.

Or . . .

> Dismissal for failure to prosecute is proper when there has been a clear record of delay or contumacious conduct by the plaintiff, *and/or plaintiff's counsel.*

Thus, according to previous Fourth Circuit holdings, in reviewing dismissal under F.R.C.P. Rule 41(b), *a court must ascertain (1) the degree of personal responsibility of the plaintiff,* (2) the amount of

prejudice caused the defendant, (3) the existence of "a drawn out history of deliberately proceeding in a dilatory fashion," and (4) the existence of a sanction less drastic than dismissal. *Davis v. Williams,* 588 F.2d 69, 70 (4th Cir. 1978); *Ramsay v. Bailey,* 531 F.2d 706 (5th Cir. 1976), *cert. denied,* 429 U.S. 1107, 97 S. Ct. 1139, 51 L. Ed. 2d 557 (1977).

In *Davis,* a prison inmate brought action against prison officials alleging that he had been denied essential medical treatment for a hip injury received before his incarceration. The District Court entered judgment dismissing the action for failure to prosecute, and the inmate appealed. The Fourth Circuit held that the District Court did not abuse its discretion in dismissing for failure to prosecute, reasoning that the prison inmate, having been given assurances of adequate medical treatment, was personally responsible for delaying his case. Specifically, the prison inmate himself had refused to cooperate with doctors and the officials who were attempting to arrange treatment for his injury. Additionally, after agreement between the parties that the prison inmate in *Davis* would undergo surgery by a surgeon of his choice, the inmate, himself, failed to make arrangements for the surgery. Thus, having found the prison inmate personally responsible for the delay, the Fourth Circuit upheld the District Court's judgment dismissing the action with prejudice.

In determining whether to dismiss a case, Courts of Appeals recognize that dismissal with prejudice should be ordered under Rule 41(b) "only in the face of a clear record of delay or contumacious conduct by the plaintiff." *Dove v. Codesco,* 569 F.2d 807, 810 (4th Cir. 1978); *Durham v. Florida East Coast Railway Co.,* 385 F.2d 366, 368 (5th Cir. 1967); *Gill v. Stolow,* 240 F.2d 669, 670 (2d Cir. 1957); *see also Mitchell v. Beaubouef,* 581 F.2d 412 (5th Cir. 1978); *cert. denied,* 441 U.S. 966, 99 S. Ct. 2416, 60 L. Ed. 2d 1072 (1979); *Moore v. St. Louis Music Supply Co., Inc.,* 539 F.2d 1191, 1193 (8th Cir. 1976); *Finley v. Parvin/Dohrmann Co.,*

Inc., 520 F.2d 386, 391 (2d Cir. 1975); *Syracuse Broadcasting Corp. v. Newhouse*, 271 F.2d 910, 914 (2d Cir. 1959).

The Fifth Circuit jurisprudence is exemplified by *Connolly v. Papachristid Shipping Ltd.*, 504 F.2d 917 (5th Cir. 1974) where it was determined that the District Court abused its discretion in dismissing Plaintiff's claim. In *Connolly* a foreign national seaman's suit under the Jones Act was dismissed for failure to prosecute. Plaintiff, who was in the British West Indies, had received a notice from the District Court, ordering him to find new local counsel. Despite Plaintiff's inability to timely comply with the Court's order, the *Connolly* Court held that Plaintiff had made substantial efforts to comply with the Court's order and that Plaintiff's conduct did not rise to such contumacious and vexatious delay as to justify dismissal of a possibly meritorious claim.

In *Ramsay*, the Fifth Circuit held that the District Court's dismissal with prejudice for want of prosecution was justified. Plaintiff was proceeding *pro se* against defendants who were allegedly involved in bringing about Plaintiff's commitment to a mental institution. The trial court had issued repeated explicit warnings that Rule 41(b) dismissal would result from Plaintiff's continued failure to proceed. In finding the *Ramsay* Plaintiff personally responsible for the delays in failing to prosecute, the Fifth Circuit upheld the District Court's Rule 41(b) dismissal.

Ramsay, however, is distinguishable from the present case. In *Ramsay*, the Plaintiff was fully and repeatedly apprised of the possible imposition of the Rule 41(b) dismissal. On the present record, Mrs. Janeau was never aware of the possible imposition of such a "terminal" sanction, where the prior dismissal was premised on Petitioner's procedural capacity which in no way reflected delay or contempt.

In the present case, the record is void of any inquiry by the

District Court into the first and foremost consideration — "the degree of personal responsibility or involvement of Plaintiff." This issue was specifically addressed by the Fourth Circuit panel in its questions to counsel, yet Mrs. Janeau's "personal responsibility" was not treated in the *per curiam*. By failing to consider the degree of personal responsibility of the Petitioner, despite the controlling decision of *Davis v. Williams, supra*, the District Court misapplied the mandatory first step of the *Davis* test to determine the propriety of dismissal under Rule 41(b). By affirming the dismissal of Petitioner's suit, absent even the slightest inquiry by the District Court into the Plaintiff's degree of personal responsibility, the Fourth Circuit has rendered a decision in glaring conflict with the decisions of other United States Court of Appeals on the same matter. Therefore, in accordance with the Rules of the Supreme Court of the United States, Petitioner respectfully urges this Honorable Court to exercise its discretion to review the holding of the United States Fourth Circuit Court of Appeals, below, by granting its Writ of Certiorari to correct this dangerously erroneous opinion.

III.

BECAUSE EXPERT TESTIMONY IS NOT ABSOLUTELY ESSENTIAL TO ESTABLISH A *PRIMA FACIE* CASE IN A DEFECTIVE PRODUCT ACTION, THE DECISION BELOW IS FUNDAMENTALLY OFFENSIVE TO THE HOLDINGS OF THIS COURT AND LEGITIMATE CONCERNS OVER RISING LITIGATION COSTS.

Although the Respondent did not argue that the trial on the merits would somehow be impeded or more costly if the Petitioner prosecuted her claims based only on fact testimony, the trial court nonetheless declined to impose the more "fitting" and less harsh sanction suggested by opposing counsel.

The danger implicit in the decision of the panel, below, is substantial when viewed upon the backdrop of ever-increasing litigation costs which are, in many instances, stifling. Rule 702 of the Federal Rules of Evidence which "enables" expert witnesses to testify "in the form of an opinion or otherwise" is prefaced upon the following *proviso:*

> *IF* scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . .

See Rule 702, Federal Rules of Evidence. Where, in view of Petitioner's active prosecution of her claims, the appropriate "sanction" would have been to preclude expert testimony, the District Court's dismissal signals that, irrespective of whether the trier of fact will require assistance "to understand the evidence or to determine a fact in issue", expert testimony has now become indispensable to establish a *prima facie* case in a defective product action litigated in the Fourth Circuit's jurisdiction.

Consequently, the Fourth Circuit's holding, below, does not comport with the fundamental principles of the Federal Rules of Civil Procedure and cannot stand in harmony with decisions of other United States Courts of Appeals and of this Court. Moreover, by requiring expert testimony as a mandatory prerequisite to every "products liability" action, the Fourth Circuit has apparently abandoned the requirement that the subject "must be so distinctly related to some science, profession, business or occupation as to be beyond the understanding of the average layman." *See Webb v. Fuller Brush Company,* 378 F.2d 500 (3d Cir. 1967), *McCormick on Evidence,* §§ 12, 13 (1972) and *State v. Wheeler,* 416 S.2d 78 (La. 1982). In the instant case, the eyewitness testimony of the decedent's co-workers who were on the jobsite when Petitioner's son was electrocuted provided sufficient deposition testimony

from which laymen would be capable of concluding that the crane manufactured by Respondent was defective. Thus, because jurors of common understanding would be capable of forming a judgment concerning the ultimate issue of fact in the case *sub judice*, the use of expert testimony is neither required, nor favored. *See Salem v. U.S. Lines Company*, 370 U.S. 31, 82 S. Ct. 1119 (1962). Because all primary facts in the instant case can be intelligibly described to a jury by eyewitnesses, and jurors of common understanding are capable of comprehending such facts and drawing the correct conclusions from them, expert testimony is unnecessary and should be properly excluded. *Id.* Inasmuch as the Fourth Circuit's decision, herein, seriously departs from the prior holding of this Honorable Court, Petitioner respectfully maintains that supervisory review is warranted and should be exercised.

CONCLUSION

The importance of granting Certiorari in this case cannot be overstated. The misapplication of prior case law, both in the previous pronouncements of this Court and the lower federal courts, threatens any expectation of consistency in application of federal procedure where the Courts' power of dismissal is sought to be invoked. Such a dismal result need not occur if this Court will articulate a uniform rule requiring that a District Court may exercise its discretionary dismissal powers *only* where there has been appropriate inquiry, and a threshold degree of personal responsibility of the plaintiff has been ascertained. Moreover, supervisory review is also appropriate in order to underscore this Court's previous warnings against the superfluous use of expert testimony.

Accordingly, this Court should grant a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT FILED AUGUST 24, 1993

FILED
August 24, 1993

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1923
CA-90-194-C-C-V

BRENDA JANEAU

Plaintiff-Appellant

v.

PITMAN MANUFACTURING COMPANY, INCORPORATED

Defendant-Appellee

and

DUKE POWER COMPANY; B&D CONTRACTORS, INCORPORATED

Defendants

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

Appendix A

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED JULY 27, 1993

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1923

BRENDA JANEAU,

Plaintiff-Appellant,

v.

PITMAN MANUFACTURING COMPANY, INCORPORATED,

Defendant-Appellee,

and

DUKE POWER COMPANY; B&D CONTRACTORS, INCORPORATED,

Defendants.

Appeal from the United States District Court
for the Western District of North Carolina, at Asheville.
Richard L. Voorhees, Chief District Judge.
(CA-90-194-C-C-V)

Argued: May 5, 1993

Decided: July 27, 1993

Before PHILLIPS and MURNAGHAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

Appendix B

COUNSEL

ARGUED: Michael P. Wilty, KEATY & KEATY, Lafayette, Louisiana, for Appellant. Francis Horatio Brown, III, LEMLE & KELLEHER, New Orleans, Louisiana, for Appellee. ON BRIEF; Robert B. Keaty, Eugene P. Redman, KEATY & KEATY, Lafayette, Louisiana, for Appellant. George Frazier, LEMLE & KELLEHER, New Orleans, Louisiana, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Brenda Janeau brought a products liability claim on behalf of her son's estate against Pitman Manufacturing Company which manufactured the heavy crane her son was operating when he died. Janeau was cited several times for delay and failure to respond to defense requests and court orders. The district court threatened to sanction Janeau and twice dismissed her case. The second dismissal was with prejudice and was based on Fed. R. Civ. P. 16(f) (failure to obey scheduling or pretrial order), Fed. R. Civ. P. 37(b)(2)(C) (failure to obey an order to permit or provide discovery), and Fed. R. Civ. P. 41(b) (failure to prosecute or to comply with the rules or any order of the court). Janeau has appealed the district court's dismissal.

On December 5, 1988, John Ray Janeau, then an employee of Southeastern Boring Contractors and a resident of North Carolina, was electrocuted in a fatal construction site accident in Charlotte, North Carolina. At the time of the accident, John Ray Janeau was

operating a truck-mounted crane manufactured by Pitman Manufacturing Company, a Pennsylvania corporation, at a job site maintained and managed by B&D Contractors, a North Carolina corporation, which had subcontracted a portion of the work to Southeastern. The crane came into contact with an energized power line owned and maintained by Duke Power Company, a North Carolina corporation. John Ray Janeau was electrocuted and killed instantly.

On November 2, 1989, John Ray Janeau's mother, Brenda Janeau, was appointed provisional administratrix of the "Succession of John Ray Janeau" by the 25th Judicial District Court for the Parish of Plaquemines, Louisiana, where she resided. She commenced the present wrongful death action against Pitman in the Civil District Court for the Parish of New Orleans, Louisiana, on November 29, 1989. Her claim was predicated on the theory that the crane had design or manufacturing defects and that Pitman had a duty to warn of such hazards and dangers.

Pitman filed a notice of removal on January 4, 1990, thereby removing the case to the United States District Court for the Eastern District of Louisiana. After some preliminary discovery, the case was transferred on June 20, 1990, to the United States District Court for the Western District of North Carolina, Charlotte Division, upon Pitman's motion.

Six months after the case was transferred to North Carolina, Brenda Janeau first communicated with the district court in Charlotte. Without offering any explanation for the delay, she moved to amend her complaint so as to name Duke Power and B&D Contractors as co-defendants, alleging for the first time that those parties were "liable to plaintiff jointly, severally, and in *solido* with each other and defendant, Pitman." Leave to file the

amended complaint was granted on December 12, 1990. Subsequently, on February 27, 1991, the case was transferred to the Asheville Division, because of a potential conflict of interest in Charlotte.

Although added as co-defendants in December 1990, neither Duke nor B&D was served by Janeau until March 25, 1991, again without explanation for the delay. In their responsive pleadings filed on April 16, 1991, Duke and B&D raised the issue of absence of diversity jurisdiction and Janeau's incapacity to sue because of her failure to qualify properly under North Carolina law as a personal representative of her son's estate. On June 3, 1991, Pitman moved to dismiss the suit on the latter ground.

On October 25, 1991, after considering oral arguments and voluminous briefs, the district court dismissed the case as to Duke and B&D for lack of diversity jurisdiction,* and afforded Janeau thirty days, or until November 27, within which to seek proper qualification as the personal representative of her son's estate and to inform the court of such qualification. The district court specifically stated in its opinion and order that Janeau's failure to qualify within thirty days would result in the dismissal of her claims against Pitman.

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* The only basis for the district court's jurisdiction in the present case was complete diversity of citizenship between the plaintiff and the defendants, as provided for in 28 U.S.C. § 1332. Under the 1988 amendments to § 1332, "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent." 28 U.S.C. § 1332(c)(2). The new provision applies to any civil action commenced in or removed to a United States District Court after May 18, 1989. Since Janeau's suit was removed to federal court on January 4, 1990, the 1988 amendments are controlling. Accordingly, she was deemed to be, in her capacity as administratix, a citizen of North Carolina and was not in diversity of citizenship with Duke & B&D, both North Carolina corporations.

Appendix B

As of December 3, 1991, a date after which those thirty days had expired, the district court had received no notice that Janeau had qualified; therefore, upon Pitman's motion, it dismissed the instant case for failure to comply with an order of the court in a timely fashion. Eight days later, Janeau filed a motion for reconsideration, informing the court that she had indeed qualified as a personal representative prior to the November 27 deadline but had failed to notify the court of her qualification. The district court rescinded its order of dismissal on December 19, 1991, but repeated its warning of dismissal and other sanctions for further transgressions by counsel, and permitted the case to go forward upon filing of an amended complaint.

Janeau filed her third amended complaint on December 30, 1991. Pitman filed a motion for scheduling order on February 19, 1992, which the trial court later granted when Janeau failed to respond. Janeau never notified the trial court of any objections to or difficulties with the discovery schedule or proposed an alternative schedule. Janeau neither disclosed any witnesses — fact or expert — nor provided Pitman with expert reports by April 15, 1992, as required by scheduling order. Accordingly, on April 21, 1992, Pitman filed a motion to dismiss or alternatively to exclude expert testimony. Janeau did not respond. On May 7, 1992, the trial court dismissed the action with prejudice under Fed. R. Civ. P. 16(f), 37(b), and 41(b). The trial court stated that the dismissal was based on the failure by Janeau's counsel either to comply with the scheduling order, to make or cooperate in discovery, to prosecute the action, or to comply with any order.

For the first time since filing her third amended complaint in December 1991, Janeau communicated with the district court on May 22, 1992, when she filed a motion for reconsideration of the May 7, 1992 dismissal. Because Janeau's motion was filed within

ten days of the entry of judgment, the trial court treated it as a motion to alter or amend a judgment under Fed. R. Civ. P. 59(e). The trial court denied Janeau's motion for reconsideration for the following reasons:

> (1) There were at least two flagrant violations of the pretrial order by plaintiff, two violations of other orders entered by the trial court, six months of unexplained delay in moving to add Duke and B&D as co-defendants, nearly four months of unexplained delay in serving Duke and B&D, eight months of delay resulting from Janeau's lack of capacity to sue, and two dismissals.
>
> (2) Janeau never offered any explanation for her failure to respond to Pitman's motions of December 2, 1991, February 19, 1992, and April 21, 1992; to comply with the trial court's orders of October 25, 1991, and March 3, 1992; or to meet the April 15, 1992, discovery deadline.
>
> (3) No depositions had been taken from at least December 1990 to February 1992.
>
> (4) Janeau had yet to name any proposed expert witness or identify any alleged defect in Pitman's crane.

In summation, the district court concluded that the case was "no closer to trial readiness now than it was on the day the initial complaint was filed." Accordingly, the district court affirmed its

earlier dismissal with prejudice. The district judge believed that less drastic sanctions would be

> grossly inadequate and inappropriate in light of the lackadaisical prosecution of the instant case . . . Any perpetuation of the case would merely compound the prejudice already suffered by Defendant, in that Defendant would still be required to prepare a defense against some illusory allegation of negligence that two and one-half years of procedural antics and discovery shenanigans have failed to resolve . . . One would be hard pressed to argue that a less drastic sanction would be appropriate where the ultimate sanction of dismissal has already failed.

We review the district court's dismissal pursuant to Fed. R. Civ. P. 41(b) for an abuse of discretion. *See Davis v. Williams*, 588 F.2d 69, 70 (4th Cir. 1978); *see also Herbert v. Saffell*, 877 F.2d 267 (4th Cir. 1989). Specifically, we examine the lower court's ruling to see whether the district judge appropriately considered the four factors which govern a Fed. R. Civ. P. 41(b) dismissal:

> (1) the degree of personal responsibility of the plaintiff, (2) the amount of prejudice caused the defendant, (3) the existence of a "drawn out history of deliberately proceeding in a dilatory fashion", and (4) the existence of sanctions less drastic than dismissal.

Chandler Leasing Corporation v. Lopez, 669 F.2d 919, 920 (4th Cir. 1982) (quoting *Davis*, 588 F.2d at 70); *accord Herbert*, 877 F.2d at 270.

Appendix B

The district court thoroughly appraised each of the factors, finding only the first factor — personal responsibility of the plaintiff — in doubt. We find that the district court properly concluded that prejudice to the defendant, Pitman, is significant as evidenced by the fact that it repeatedly has been forced to file motions based on the failure of plaintiff to respond to court orders.

Moreover, the record reveals an obvious pattern of deliberate dilatory action on the part of Janeau's attorneys. Over the course of the two and one-half years since she filed suit against Pitman, Janeau has taken little action to prosecute her claim or to respond to court order and defense requests. Her claim against Pitman has been dismissed *twice* due to her counsel's failure to respond to court orders and to reply to defense motions. Finally, no lesser sanction would seem effective in the present case; indeed, Janeau was undeterred by an earlier dismissal.

While dismissal with prejudice is a "harsh sanction which should not be invoked lightly," *Davis*, 588 F.2d at 70, it properly was invoked in the present case. Therefore, the district court's order dismissing with prejudice Janeau's claims against Pitman is

AFFIRMED.

APPENDIX C —JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION, FILED MAY 14, 1992

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL NO. C-C-90-194-V

BRENDA JANEAU,

Plaintiff,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Defendant.

JUDGMENT

For the reasons stated in the Order of Dismissal filed May 7, 1992,

IT IS ORDERED, ADJUDGED, AND DECREED that Defendant's Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of this Matter is ALLOWED and this case is hereby DISMISSED WITH PREJUDICE.

THIS the 14th day of May, 1992.

s/ Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX D — ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION FILED MAY 7, 1992

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL NO. C-C-90-194-V

BRENDA JANEAU,

Plaintiff,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Defendant.

ORDER OF DISMISSAL

THIS MATTER is before the Court on Defendant's "Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of this Matter" and memorandum in support thereof, filed April 21, 1992. For the reasons stated herein, Defendant's motion to dismiss shall be allowed.

The captioned civil matter has floundered in the court systems of Louisiana and North Carolina for nearly two and one-half years, and is no closer to trial readiness now than it was on the day the initial complaint was filed. The factual background of this case is set forth in an earlier decision by this Court, and will not be repeated herein. *See* Memorandum of Opinion and Order, filed October 25, 1991 (Pleading No. 39) ["Opinion"]. However, the Court will recount the procedural history of this case.

Appendix D

Plaintiff, the mother of the decedent, originally instituted this wrongful death action against the Defendant in the Civil District Court for the Parish of Orleans, State of Louisiana, on November 29, 1989. Defendant, a Pennsylvania corporation with its principal place of business in Pennsylvania, filed a notice of removal on January 4, 1990 thereby removing this case to the United States District Court for the Eastern District of Louisiana. On June 20, 1990, the case was transferred to the United States District Court for the Western District of North Carolina, Charlotte Division. On December 6, 1990, Plaintiff moved to amend her complaint so as to add two "jointly liable" defendants, Duke Power Company ["Duke"] and B & D Contractors of Shelby, Inc. ["B & D"], both being North Carolina corporations with their principal places of business in North Carolina. Leave was granted by U.S. District Court Judge Graham C. Mullen for the filing of the amended complaint on December 12, 1990. The case was transferred to this Court on February 27, 1991, when a potential conflict of interest arose in the Charlotte Division.

On October 25, 1991, the Court found that Plaintiff lacked the capacity to sue Defendant in the instant case due to her failure to qualify properly as a personal representative of the decedent's estate under North Carolina law. *See* Opinion.[1] However, the Court afforded Plaintiff thirty days, or until November 27, 1991, within which to properly qualify as a personal representative of decedent's estate. *Id.* at 24.[2] Plaintiff's apparent failure to comply

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1. The Court also ruled that, because Plaintiff had to be considered a North Carolina resident for purposes of diversity jurisdiction, *see* 28 U.S.C. § 1332(c)(2), all claims against Duke and B & D had to be dismissed for lack of diversity jurisdiction. *See* Opinion at 14-16.

2. This additional thirty-day period for qualification was permitted even though "counsel for the Plaintiff was first notified of the question of Plaintiff's

(Cont'd)

with the Court's Opinion in a timely fashion resulted in the dismissal of Plaintiff's Claims. Order of Dismissal, filed December 4, 1991 (Pleading No. 41). Upon subsequent motion by the Plaintiff, the Court rescinded its dismissal order on December 19, 1991, and permitted the case to go forward upon filing of an amended complaint by the Plaintiff.[3] Order at 2, filed December 19, 1991 (Pleading No. 44).

Since filing its amended complaint on December 30, 1991, Plaintiff has filed no pleadings in the instant case, and has apparently failed to participate in the discovery process. For example, the Court waited 13 days for Plaintiff's response to Defendant's motion for a discovery scheduling order.[4] When no response was forthcoming, the Court entered the requested scheduling order. *See* Order, filed March 3, 1992 (Pleading No. 51). Plaintiff's failure to comply with the first deadline set forth in

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(Cont'd)
capacity to sue on or about April 18, 1991, approximately six months prior to the Court's Opinion requiring Plaintiff to qualify as an ancillary administrator under North Carolina law within the ensuing thirty days." Order at 2, filed December 19, 1991 (Pleading No. 44).

3. The Court found that, although Plaintiff had indeed timely qualified as a personal representative of the decedent's estate, counsel for the Plaintif failed to notify the Court of such qualification until two weeks after the Court-imposed deadline for qualification and one week after the Court's dismissal of the case for failure to timely qualify. *See* Order, filed December 19, 1991 (Pleading No. 44).

4. Defendant experienced the same failure to respond when it suggested a consensual discovery schedule to counsel for the Plaintiff. *See* Pitman Manufacturing Company, Inc.'s Motion for Scheduling Order, filed February 19, 1992 (Pleading No. 49) ("Pitman has sought plaintiff's input in establishing a Joint Motion for Scheduling Order, but received no response from plaintiff's counsel.").

that Order[5] prompted the motion to dismiss considered herein. Fifteen days have passed since the filing of Defendant's motion to dismiss, and Plaintiff has yet to respond to the pending motion. Plaintiff has also failed to respond or object to any of the numerous notices for deposition filed by the Defendant since December 30, 1991. *See* Notice of Deposition, filed February 4, 1992 (Pleading No. 48); Notice of Rule 30(b)(6) Deposition of B & D Contractors, Inc., filed April 28, 1992 (Pleading No. 54); Notice of Deposition, filed April 28, 1992 (Pleading No. 55); Notice of Rule 30(b)(6) Deposition of Duke Power, filed April 28, 1992 (Pleading No. 56); Notice of Deposition, filed April 28, 1992 (Pleading Nos. 57, 58, 59, 60).

The history of dilatory practices displayed by counsel for the Plaintiff leaves this Court with no reasonable alternative but dismissal of this cause of action. The resurrection of this case after one dismissal should have purged this matter of any further procrastination by any party. Obviously, the mere threat of dismissal has not had this effect. *See* Order at 4, filed December 19, 1991 (Pleading No. 44) (warning counsel that failure to file a timely amended complaint "shall result" in dismissal). Therefore, based on the failure by counsel for the Plaintiff either to comply with the scheduling order or to make or cooperate in discovery, the Court shall invoke Fed. R. Civ. P. 16(f) and 37(b) and dismiss all claims against the Defendant. The Court shall also dismiss this case "[f]or failure of the plaintiff to prosecute [and] to comply with these rules [and] any order of court," which "operates as an adjudication upon the merits." Fed. R. Civ. P. 41(b).

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5. To date, Plaintiff has not complied with the following provision of the scheduling order: "Deadline for Plaintiff to disclose all fact and expert witnesses and to provide Defendant with expert reports — April 15, 1992." Order, filed March 3, 1992 (Pleading No. 51).

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IT IS, THEREFORE, ORDERED that Defendant's Motion to Dismiss and/or Alternatively to Strike Plaintiff's Use of Experts at the Trial of this Matter is hereby ALLOWED, and all claims against Defendant Pitman Manufacturing Company, Inc., contained in the captioned civil matter are hereby DISMISSED WITH PREJUDICE.

THIS the 7th day of May, 1992.

s/ Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX E — SCHEDULING ORDER ENTERED BY THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION FILED MARCH 3, 1992

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

CIVIL DOCKET NO. C-C-90-194-V

BRENDA JANEAU,

Plaintiff,

vs.

PITMAN MANUFACTURING COMPANY, INC.,

Defendant.

ORDER

THIS MATTER is before the Court on Defendant's motion for a scheduling order in the captioned civil matter.

For the reasons stated in Defendant's motion and supporting memorandum and in accordance with Fed. R. Civ. P. 16 and the Plaintiff having filed no objection, the Court finds that such an order would be appropriate in the instant case and that Defendant's proposed schedule is reasonable.

IT IS THEREFORE ORDERED that the parties in the captioned civil matter shall comply with the following schedule:

1. Deadline for Plaintiff to disclose all fact and expert witnesses and to provide Defendant with expert reports — April 15, 1992;

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2. Deadline for Defendant to disclose all fact and expert witnesses and to provide Plaintiff with expert reports — May 15, 1992;

3. Deadline for either party to add parties and to amend pleadings — May 15, 1992; and

4. Deadline for the completion of *all* discovery by all parties — July 1, 1992.

IT IS FURTHER ORDERED that, unless expressly changed herein, the Pretrial Order entered in this matter on July 13, 1990, remains in full force and effect until further order of this Court.

THIS the 3rd day of March, 1992.

s/ Richard L. Voorhees
RICHARD L. VOORHEES, CHIEF JUDGE
UNITED STATES DISTRICT COURT

APPENDIX F — RELEVANT STATUTES

28 U.S.C. § 1254. Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petitioner of any party to any civil or criminal case, before or after rendition of judgment or decree;
>
> (2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between —

> (1) citizens of different States;
>
> (2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title —

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-

defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.